APPENDIX

As stated in the main Brief, we are reprinting our analysis of the four decisions of the United States Supreme Court, which we think touches upon all phases of the law of this case. We clearly show, in our humble judgment, that the first two cases, that of *Davis v. Green* and *A. C. L. v. Southwell*, have no application to the case at bar.

James C. Davis, Director General of Railroads, etc.
Petitioner.

vs.

Mrs. Maude E. Green, Admr. of the estate of Jesse Green, deceased.

260, U. S., 349; 67 L. Ed., 299, 43 S. Ct. 123. Decided December 4, 1922.

Case tried below in Circuit Court for Forest County, State of Mississippi.

Reported below in 125 Miss., 476; 878 So. 649.

The deceased, Jesse Green, was a conductor employed by Walker D. Hines, Director General of Railroads, in the railway yards at Hattiesburg, Mississippi. He was shot and killed by an engineer by the name of McLendon, also employed by the same defendant. The shooting occurred in said railway yards at Hattiesburg, Mississippi.

The deceased was conductor of a switching crew operating in the railway yards. The engineer was in charge of the engine which was engaged in moving certain cars from one point to another. In addition to the engineer and several other crew members, there was a negro switchman, who incurred the anger of Engineer McLendon by repeating a certain signal several times, after the latter had told him not to give any signal but once. The switchman, after repeating the particular signal on this occasion, mounted the running board of the locomotive. Apparently infuriated at the switchman for failing to do as he said, the engineer armed with a heavy hammer,

came down from his cab and berated the negro for disobeying him. The switchman replied that he was doing the best he could to follow out the instructions of Green, the deceased conductor, *who was foreman of the crew and over all of them.* McLendon, the engineer, replied *that he would kill both the switchman and the conductor.* He thereupon knocked the negro off the running board with the hammer. The switchman was so badly injured that he had to be sent to a hospital, which necessitated some of the train crew having to leave their jobs in order to carry him. McLendon, in a most cold-blooded and indifferent manner, started up the engine and ran it on the switch, which was to have been thrown by the injured negro. He knew, of course, that the negro could not perform this task. McLendon stopped the engine and the deceased proceeded from one of the cars in the rear of the engine to throw the switch himself, which it was his duty to do in the event of an emergency such as then faced the crew. McLendon came down from his cab with a pistol and went to the front of his engine and when Green came up he exclaimed, "Why in the hell have you not thrown the switch?" Almost immediately he fired two or three shots at the conductor and killed him on the spot. There was evidence of the bad reputation of the engineer for violence and further evidence of previous differences and ill will between the two men. Several months before this instance the deceased had applied for and obtained a transfer which separated him from the engine man whose bad reputation was known to the deceased. Knowing that he might again be assigned to a crew with McLendon, the deceased, a short time before his death, applied for another transfer from night work to day work, which was granted, and he was in fact assigned to work with the man who later shot and killed him. It appeared that several times Green had reported McLendon for failure to perform his duties as required by the rules of the railway company.

Upon the trial the widow recovered a verdict of $35,000, which was reduced by the State Supreme Court to $16,000, doing so upon the ground that the Federal Employers' Lia-

bility Act did not apply and that the State decisions controlled the question as to the amount of damage.

The Director General carried the case on appeal to the United States Supreme Court.

Among other things, the Supreme Court of Mississippi had held that the Federal Employers' Liability Act did not apply and that the entire case was controlled by the State law, basing its decision upon the ground that the cars being moved by switching crew at the time in question were not being used in interstate commerce.

The United States Supreme Court reversed the State Court, holding as follows:

> "The Supreme Court sustained the judgment, although it held that the case was governed by state law. It held that, on the general principle of liability, the act of Congress and the law of the state agreed. It held, however, that there were important differences between the two laws with regard to the measure of damages and otherwise, and that, as the case was tried under the act of Congress, and as, on the evidence, the highest tmount that could have been recovered under the Federal act was $16,000, the plaintiff must remit all above that amount if she would retain her judgment, although, under the state law, she could have recovered more.
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> "The ground on which the railroad company was held was that it had negligently employed a dangerous man, with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present *the killing as done to further the master's business*, or as anything but a wanton and wilful act, doe to satisfy *the temper or spite of the engineer*. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green

which it was his duty to obey,—in other words, *that he did a wilful act wholly outside the scope of his employment* while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondent superior applies.

"As we understand the opinion of the Supreme Court of Mississippi, it based its decision in part upon the assumption that liability for the engineer's act was imposed upon the defendant by both laws; and this assumption would be a sufficient ground for reversing the judgment. But we should come to the same conclusion even if our understanding were shown to be wrong. As the record stands, it appears to us that the case was tried upon the warranted supposition that there was no serious controversy as to the parties having been engaged in interstate commerce, and for that reason the defendant paid but slight attention to proving the fact. It seems at least not improbable that the parties were so engaged. In such circumstances the defendant is not to be deprived of its rights under the law of the United States by a decision that the fact now questioned was not adequately proved. On such matters we must judge for ourselves. If there is a new trial, probably the plaintiff will be allowed to dispute the character of the employment, if she is so advised. See *Bowen v. Illinois*, C. R. Co. 70 L. R. A. 915, 69 C. C. A. 444, 136 Fed. 306, 18 Am. Neg. Rep. 289."—*(Italics ours)*.

Atlantic Coast Line Ry. Co.,
Petitioner.

vs.

Ida May Southwell, Admx., of H. J. Southwell.
275, U. S., 64; 72 L. Ed. 157; 48 S. Ct. 25.
Reversal of N. C. Supreme Court.
Decision below reported in 131 S. E. 670.
Case decided October 31, 1927.

Very few, if any, of the facts are given in the United Stat-

es Supreme Court report of this case. We present the following analysis of the evidence as found in the report of the opinion of the Supreme Court of North Carolina in 131 S. E. 670:

The plaintiff's intestate was employed by the defendant railway company as an engineer, running from Fayetteville, North Carolina, to Wilmington, North Carolina. One H. E. Dallas was employed by the defendant as assistant yard master at Wilmington. About ten days or two weeks before the plaintiff's intestate was shot and killed by Dallas, the latter was appointed a *special police officer* by the Mayor of Wilmington at the request of the company. There was a strike on at this time by the shop men of the railway company and the railway yards were picketed by the strikers. Dallas performed various services under E. L. Fonvielle, general yard master. The strike began on July 1, 1922, and between that time and the killing on July 18, 1922, the general yard master had seen Dallas carrying a pistol about the yards. It developed during the trial that Southwell had evinced an antagnostic attitude toward the strike breakers and apparently included Dallas in his enmity toward the non-union workers. The deceased had made one or two threatening remarks to Dallas and had attempted at one time to crush Dallas between two cars which Dallas was inspecting. For his conduct and threatening remarks, Southwell had been admonished by W. H. Newell, Superintendent of the company. He ordered Southwell to attend strictly to his own business and keep his mouth shut. On the occasion when Southwell tried to run over Dallas with his train some threatening remarks were made by Southwell. Unquestionably, there was bad blood between the two men of a very serious nature prior to the shooting.

On the day of the fatal act, Fonvielle saw Dallas with a pistol but as he was a special police officer thought nothing of it.

Southwell came in on his run, put up his engine and went to the engineer washroom and cleaned up, his duties for that time being at an end. On his way going home he met Dallas

out in the yards. As to the actual shooting little, if any, evidence was developed. It seems certain, nowever, that at the time Dallas was not on any company business. *He had no official duties to perform which required him to contact Southwell.* He had, a few minutes before the shooting, informed Fonvielle that he wanted to see Southwell and ask him to "lay off of me." *This appears to have been his only motive, if any, in contacting Southwell at the time.* Southwell had no duties to perform at the time, he having completed his run for the day and was going home. *The final quarrel and killing had no connection with any railroad busiess.* Dallas firing two or three shots and the engineer died as a result of his wounds.

Southwell's widow brought action against the company and recovered a verdict of $12,000, which was upheld by the State Supreme Court.

The United States Supreme Court reversed the State Court and said:

> "This is an action brought against the petitioner by the administratrix and widow of one of the petitioner's employees, for the death of her husband by a murder which it is alleged that the petitioner 'with gross negligence wilfully and wantonly caused, permitted and allowed.' In view of the decision in *Davis v. Green*, 260 U. S., 349, 67 L. Ed. 299, 43 Sup. Ct. Rep. 123, *the plaintiff did not attempt to hold the petitioner liable as principal in the act, but relied on its failure to prevent the death.* The Supreme Court of North Carolina upheld a judgment for the plaintiff. 191 N. C., 153, 131 S. E., 670. It is admitted that the action is based upon the Federal Employers' Liability Act for April 22, 1928, chap. 149, Section 2, 35 Stat. at L. 65, U. S. C. title 45, Section 52, and the question is whether there was any evidence that the death resulted in whole or in part from the negligence of any officer of the petitioning road, under the law as applied by this court. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 371, 62 L. Ed., 1167, 1170, 38 Sup. Ct. Rep. 535.

"It would be straining the language of the act somewhat to say in any case that a wilful homicide 'resulted' from the failure of some superior officer to foresee the danger and to prevent it. In this case at all events we are of opinion that there was no evidence that warrants such a judgment. It is not necessary to state the facts in detail. Those mainly relied upon are that Fonvielle, the general yard master knew that Southwell, the man who was killed, on previous occasions had used threatening language to Dallas, who shot Southwell; that Fonvielle knew or ought to have known that they were likely to meet when they did; that Fonvielle was with Dallas, his subordinate, just before that moment and that Dallas said to him, 'Cap., all I want to do is to ask Southwell to lay off of me and let me alone,' and that Fonvielle said that he must not see Southwell, that if he saw him and talked to him it might bring about unpleasant consequences; that Fonville left Dallas and after having gone a short distance saw him and Southwell approaching each other and had taken a few steps towards them with a view to separate them in case of an altercation, but that before he had time to reach them the shot was fired. Fonvielle knew that Dallas had a pistol, but there was a strike at the time, Dallas was a special policeman and had a right to carry it and not unnaturally did. The only sinister designs of which there is any evidence were of Southwell against Dallas, unless Dallas' remark just before the shooting be taken to fore-shadow the event, which it certainly did not seem to until after the event had happened. It appears to us extravagant to hold the petitoner lable in a case like this. See *St. Louis-San Francisco R. Co. v. Mills*, 271, U. S. 344, 70, L. Ed, 979 46 Sup. Ct. Rep. 520."—*(Italics ours)*.

Inez M. Jamison, et al., etc.,
Petitioner.

vs.

Valentin Encarnacion.

281 U. S., 635; 74 L. Ed., 1082; 50 S. Ct. 440.
Decided May 26, 1930.

As will be seen by the date entries above, the case now being digested was decided eight years later than the case of *Davis v. Green, supra,* and three years after the decision in *Atlantic Coast Line Ry., Co., vs. Southwell, supra.*

The reports of the Encarnacion case will be found in 224 App. Div. (N. Y.), 260; 230 N. Y., Sup. 16; 251 N. Y., 218, and 167 N E 422.

The facts briefly stated are as follows:

The plaintiff was a member of a crew loading a barge at Brooklyn, N. Y. One Curren was the foreman of the crew, While plaintiff was upon the barge engaged in his work, the foreman committed an assault and battery upon him and seriously injured him. The action was brought under the Merchant Marine Act and the Federal Employers' Liability Act. The Merchant Marine Act is now Section 688, Title 46, USCA, which, among other things, provides: *"That in any action by an injured seaman "all statutes of the United States conferring or regulating the right or remedy in case of personal injury to railway employees shall be applicable."—(Italics ours).*

The above quoted language has repeatedly been held to be a direct reference to the Federal Employers' Liability Act.

From all the reports of the case, the following facts were clearly established:

The specific work at hand at the time of plaintiff's injury was the loading of the barge. The foreman cursed the plaintiff for an opprobious name and ordered him to "hurry up." The plaintiff replied that he knew what to do. Whereupon, the foreman knocked him down with his fist. In the fall the plaintiff claimed that he was seriously hurt. The plaintiff was awarded a verdict of $2500.00, for which judgment was entered.

On appeal to the Supreme Court of New York, *this judgment and verdict was reversed, the reversal opinion holding in substance that an employer was not liable for a assualt and battery by one employee upon another, although the offending employee was at the time acting as gang boss.* Among other things, the Court said:

> "There is no analogy between the real case and the invoked rules. The Federal Employers' Liability Act, supra, is explicit in predicating liability upon 'negligence.' No term or phrase other than 'negligence' as a basis of liability is mentioned in the legislation. Certainly 'assault' is nowhere mentioned or referred to. The entire theory of the act is that of negligence, as the term has been understood from time immemorial, emphasized by provisions for a diminution of damages recovered when there is found to be 'negligence attributable to such employee,' or he has 'been guilty of contributory negligence.' It is these provisions only which were extended by the Jones Act, supra, with the result in my opinion, that the case of *Gabrielson v. Waydell, supra,* is still alive in so far as concerns a recovery of full indemnity for injury, as at common law.
>
> "The case involves nothing more than that of an assault by one employee upon another, and for such an act a master is not responsible, even though the assault be committed by one who though a fellow servant, subject to his orders, should have hurried his work a little more or done something in a different way. The master, neither expressly nor impliedly, employed the gang boss to commit an assault upon another employee. In my opinion the action is not maintainable, and I therefore advise that the judgment be reversed upon the law and the facts, with costs, and that the complaint be dismissed, with costs."

The plaintiff carried his case to the Court of Appeals of New York. In an unanimous decision, participated in by the late United States Supreme Court Justice Gardozo, then on

the former court, and six other outstanding Justices, that Court reversed the N. Y. Supreme Court and affirmed the judgment in favor of the plaintiff.

It will be borne in mind that in the trial Court the foreman testified that it was his duty to "boss" the gang and to keep them "busy all the time." The entire opinion of the New York Court of Appeals is of much value in passing upon the important issues in the trial of the case at bar. The opinion in part says:

"The cause of action, having arisen upon the navigable waters of the United States, is to be disposed of under the principles of maritime law. *International Stevedoring Co. vs. Haverty*, 272 U. S., 50, 47, S. Ct. 19, 71 L. Ed. 157; *Northern Coal & Dock Co. v. Strand* 278 U. S. 142, 49, S. Ct. 88, 73 L. Ed:—;*Resigne v. Jarka Co.*, 248 N. Y. 225, 162 N. E., 13. The foreman, in the management of the work intrusted to him by his employer, is a fellow servant of the members of the gang under his direction and control in the performance of the work. *Crispin v. Babbit*, 81 N. Y. 516, 37 Am, Rep. 521. For injuries suffered by the men placed under the authority of such a one as the result of his negligence or misconduct in the furtherance of the employer's business, it has been held that the employer is not liable to indemnify the injured employee. *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793. Such was the rule of the common law and of the admiralty law as defined by this court.

"The admiralty and maritime law is subject to change by Congress. Congress has acted, and the Supreme Court of the United States has said broadly *(International Stevedoring Co. v. Haverty, supra)* that 'the statutes do away with the fellow-servant rule' as applied to longshoremen engaged in stowing freight in the hold of a ship within the admiralty and maritime jurisdiction of the United States. We would be content to give this declaration its full face value were it not for the fact that the case was one of the negligence, rather than the misconduct, of a foreman. It thus becomes neces-

sary to examine the course of legislation on the subject to determine its bearing on our decisions.

"The fellow servant rule is generally stated in terms of negligence only, although misconduct of a co-employee is also within its scope. By the Seaman's Act of March 4, 1915 (38 Stat. 1185, c. 153, Section 20), it was provided that 'in any suit to recover damages for any injury sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority.' This language proved to be inadequate to substitute the common-law measure of liability for personal injuries for the maritime rule of limited libiality in the case of seaman (*Chelentis v. Luckenbach, S. S. Co.* 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed 1171) and was probably appropriate only to the relief of seamen in any event (*Yaconi v. Brady & Gioe*, 246 N. Y. 300, 158 N. E. 876). It was, however, a gesture in the direction of wider responsibility on the part of the master for the negligence of his servants. It was succeeded by the Jones Act (Merchant Marine Act of June 5, 1920; 41 Stat. c. 250, Section 33; 3 Mason's U. S. Code, tit. 46. c. 18, Section 688, p. 3273; 46 USCA, Section 688), which extends to seamen who shall suffer personal injury in the course of their employment the rights and remedies given by Congress to railroad employees (*Panama R. Co. v. Johnson*, 264 U. S. 375, 389, 44 S. Ct. 391, 68 L. Ed. 748; *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 324, 47 S. Ct. 600, 71 L. Ed. 1069; *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 49 S. Ct. 75, 73, L. Ed.—) by providing that they may maintain actions against their employers for damages, and that in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply to them. The reference is to the Federal Employers' Liability Act of April 22, 1908 (35 Stat. c. 149, Section 1; 3 Mason's U. S. Code, tit. 45, c. 2, Section 51, p. 3064; 45 USCA, Section 51) and its amendments which is thus incorporated into the maritime law of the United States. That act, wherever applicable, read literally, imposes liability on

the employer for the acts of a fellow-servant only in cases of personal injury to an employee resulting from negligence. Misconduct is not in terms included. (See, also, N. Y. Employers' Liability Law, L. 1921, c. 121, which applies the vice principal rule only to cases of negligence). Nevertheless, Mr. Justice Holmes, writing for the United States Supreme Court in the Haverty case, supra, reads the act as doing away with the fellow servant rule as freely as he reads the word 'seamen' so as to include 'stevedores.' This, it would seem, is its popular interpretation. *As the word 'seamen' in the act includes 'stevedores,' so the word 'negligence' should, 'in view of the broad field in which Congress has disapproved and changed the (fellow-servant) rule introduced into the common law within less than a 'century,' include 'misconduct.'* Reading *Gabrielson v. Waydell, supra,* in the lift of the Merchant Marine Act, and its history, we do not hesitate to say that the authority of the case as a rule of maritime law has been largely, if not fully, spent; that we should not waste time in pointing out distinctions between negligence and misconduct in this connection in order to defeat plaintiff's recovery, but should hold broadly that Congress, in doing away with the fellow servant rule in cases of negligence coming within the scope of its legislation, has left neither substance nor reason to our earlier decision, and that it is no longer controlling. We cannot, with a fair countenance, say that the master is now liable to his servants for personal injuries due to a careless foreman, but is not liable for personal injuries inflicted on them by a brutal foreman in directing the performance of the work and intended and believed to be for the interest of the master.—*Mott v. Consumers' Ice Co. supra.*

"The case differs materially from Davis v. Green, 260, U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, *In that case the engineer had received an order from the conductor which it was his duty to obey. Out of personal rancor, he killed the conductor. Neither allegations ner proof present the killing as having been done to further the master's business."—(Italics ours).*

(Encarnacion v. Jamison, et al., 167 N. E., 422.)

The defendant in turn took the case to the United States Supreme Court, which affirmed the Court of Appeals.

Every word of the final decision of the United States Supreme Court is highly important and we quote the entire opinion as follows:

"This is an action brought in the Supreme Court of New York by respondent, a longshoreman, against William A. Jamison, an employing stevedore, to recover damages for personal injuries. Plaintiff was employed by defendant as a member of a crew loading a barge lying at Brooklyn in the navigable waters of the United States. One Curren was the foreman in charge of the crew. While plaintiff was upon the barge engaged with others in loading it, the foreman struck and seriously injured him.

"*The evidence showed that the foreman was authorized by the employer to direct the crew and to keep them at work.* Plaintiff's evidence was sufficient to warrant a finding that the foreman assaulted him without provocation and to hurry him about the work. *The trial judge instructed the jury that the defendant would not be liable if the foreman assaulted plaintiff by reason of a personal difference, but that, if the foreman in the course of his employment committeed an unprovoked assault upon plaintiff in furtherance of defendant's work plaintiff might recover.* The jury returned a verdict for $2,500 in favor of plaintiff and the court gave him judgment for that amount.

"The case was taken to the appellate division, and there plaintiff invoked in support of the judgment Section 33 of the Merchant Marine Act (June 5), 1920, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act of April 22, 1908, U. S. C. title 45, Sections 51-59. The court (224 App. Div. 260, 230 N. Y. Supp. 16) held that plaintiff's injury was not the result of any neg-

ligence within the meaning of the latter act, and reversed the judgment.

"The Court of Appeals (251 N. Y. 218, 167 N. E. 422) held that the Federal Employers' Liability Act applies, and, after quoting the language of this court in *International Stevedoring v. Haverty*, 272 U. S. 50, 52, 71, L. Ed. 157, 159, 47 Sup. Ct. Rep. 19, said (p. 223): 'As the word 'seamen' in the act (Section 33 Merchant Marine Act) included 'stevedores,' so the word 'negligence' Section 1, Federal Employers' Liability Act) should . . . include 'misconduct.' It reversed the judgment of the appellate division and affirmed that of the Supreme Court.

"Section 33 of the Merchant Marine Act provides:

" 'Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .'

"Section 1 of the Federal Employers' Liability Act provides:

" 'Every common carrier by railroad while engaging in (interstate) commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .'

"Plaintiff was a seaman within the meaning of Section 33 (International Stevedoring Co. v Haverty, supra), and, as he sustained the injuries complained of while loading a vessel in navigable waters, the case is governed by the maritime law as modified by the acts of Congress above referred to. *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, 73 L. Ed. 232, 49, Sup. Ct. Rep. 88,

28 N. C. C. A. 18; *Panama R. Co. v. Johnson*, 264 U. S. 375, 68, L. Ed. 748, 44 Sup. Ct. Rep. 391. *He is entitled to recover if within the meaning of Section 1, his injuries resulted from the negligence of the foreman.*

"The question is whether 'negligence,' as there used includes the assault in question. The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault of negligence of fellow servants and applies the principle of respondent superior (Section 1), eliminates the defense of contributory negligence and substitutes a rule of comparative negligence (Section 3), abolishes the defense of assumption of risk where the violation of a statute enacted for the safety of employees is a contributing cause (Section 4), and denounces all contracts, rules, and regulations calculated to exempt the employer from liability created by the act. (Section 5).

"The reports of the House and Senate committees having the bill in charge condemn the fellow-servant rule as operating unjustly when applied to modern conditions in actions against carriers to recover damages for injury or death of their employees and show that a complete abrogation of that rule was intended. The act, like an earlier similar one that was held invalid because it included subjects beyond the reach of Congress, is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons. Second Employers' Liability Cases *(Mendou v New York, N. H. & H. R. Co.* 223 U. S. 1, 51, 56 L. Ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 375; *Minneapolis, St. P. & S. Ste. M. R, Co, v Rock*, 279 U. S. 410, 413, 73 L. Ed., 769, 49 Sup. Ct. Rep. 363.

"The rule that statutes in derogation of the common law are to be strictly construed does not require such an

adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure, Johnson v. Southern P. Co. 196 U. S. 1, 17, 18, 49 L. Ed. 363, 369, 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; *Gooch v. Oregon Short Line R. Co.* 258 U. S. 22, 24, 66 L. Ed. 443, 445, 42 Sup. Ct. Rep. 192; *Barrett v. Van Pelt*, 268 U. S. 85, 90, 69 L. Ed. 851, 860, 45 Sup. Ct. Rep. 437; *Johnson v United States*, 18 L. R. A. (N. S.) 1194, 89 C. C. A. 508, 163 Fed. 30, 32; *Cf. H. Hackfield & Co. v. United States*, 197 U. S., 442, 499, et seq., 49 L. Ed. 826, 829, 25 Sup. Ct. Rep. 456. *The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning.* It is to be construed liberally to fulfill the purpose for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Miller v. Robertson*, 266 U. S. 243, 248, 250, 69 L. Ed. 265, 271, 272, 45 Sup. Ct. Rep. 73.

"As the Federal Employers' Liability Act does not create liability without fault *(Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 501, 58 L. Ed. 1062, 1068, L. R. A. 1915, C. 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834), it may reasonably be construed in contrast with proposals and enactments to make employers liable, in the absence of any tortious act, for the payment of compensation for personal injuries or death of employees arising in the course of their employment.

"'*Negligence' is a word of broad significance, and may not readily be defined with accuracy. Courts usually refrain from attempts comprehensively to state its meaning. While liability arises when one suffers injury as the result of any breach of duty owed him by another chargeable with knowledge of the probable result of his conduct, actionable negligence is often deemed—and we need not pause to consider whether rightly—to include other elements. Some courts call wilful misconduct evin-*

cing intention or willingness to cause injury to another gross negligence. Bolin v. Chicago, St. P. M. & O. R. Co. 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446, 9 Am. Neg. Rep. 209, and cases cited. And see *Peoria Bridge Asso. v. Loomis*, 20 Ill. 235, 251, 71 Am. Dec. 263; *Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525, I. L. R, A. (N. S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 3 Ann. Cas. 42, and cases cited; *Mercer v. Corbin*, 117 Ind. 450, 3 L. R. A. 21, 10 Am. St. Rep. 76, 20 N. E. 132. *And it has been held that the use of excessive force causing injury to an employee by the superintendent of a factory in order to induce her to remain at work was not a trespass as distinguished from a careless or negligent act. Richard v. Amoskeag Mfg. Co.* 79 N. H. 380, 331, 8 A. L. R. 1426, 109 Atl. 88. *While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business. As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the act. Johnson v. Southern P. Co., supra; Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9, 10, 51 L. Ed. 681, 685, 27 Sup. Ct. Rep. 407."—*(Italics ours).*

Alpha Steamship Corporation et al.,
Petitioners.
vs.
Robert Cain
281 U. S., 642; 74 L. Ed. 1086; 50 S. Ct. 443.
Decided May 26, 1930.

The very same day the Encarnacion opinion was filed, the United State Supreme Court filed a similar opinion in the

above entitled case, which was tried below in the United States District Court for the Southern District of New York. The plaintiff was awarded a verdict of $12,000, which was affirmed in the Circuit Court of Appeals for the Second Circuit. (See 35 Fed. Rep. (2nd), 717).

From the two reports in the case, these pertinent facts are clearly established

Plaintiff was a seaman employed as a fireman on the American Steamship Alpha navigating the high seas. The incident which was the basis of this action occurred on shipboard while the vessel lay in a Venezuelan port. One Jackson was employed as the second assistant engineer on the ship. The plaintiff on the day in question showed up on his "watch" some forty minutes late. Going down the stairway to his work he encountered the first assistant engineer and became engaged in an altercation with him concerning his tardiness. Cain said he retreated to the top of the stairs and observed Jackson, the second assistant engineer talking to the first assistant. Jackson was the officer on duty in the engine room. After talking to the first assistant, Jackson followed Cain and, according to the plaintiff, struck him twice about the head with a heavy monkey wrench. The plaintiff, after being knocked down, crawled to the captain of the ship and reported the incident. He testified that Jackson was drunk. Jackson in turned claimed that Cain was drunk and that his injuries were the result of falling on deck. The plaintiff sustained almost fatal head injuries.

Upon the trial of the case, the jury returned a verdict for $12,000 in his favor. The District Judge refused to reduce it on the grounds of excessiveness.

The Circuit Court of Appeals affirmed the holdings of the District Court. The parties, the trial Court and the Circuit Court of Appeals treated the case as being one under the general maritime law of the United States and not under the Merchant Marine Act and the Federal Employers' Liability Act.

The following extracts from the Circuit Court of Appeals opinion are pertinent.

> "*Without* reciting more more of the evidence, it will suffice to say that, assuming the law to be as the court stated it, *the evidence raised issues for the jury.* Jackson's duty was to get Cain to work, if he thought Cain was able to work. The jury were entitled to find that he approached Cain for that purpose. He himself says, 'I hollered to him to come down.' They were also entitled to believe Cain's version of what transpired when the two men met at the top of the stairway. *Hence they might infer that Jackson gave the blows for the purpose of compelling Cain's immediate attendance and in connection with reprimanding him for his tardiness, although excessive violence was used, this is not conclusive that Jackson was not acting in the ship's business. The evidence made it a jury question whether he committed the assault as an officer of the ship, in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blows in a private brawl. In Davis v. Green,* 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, a very different situation was presented. There the killing of the conductor resulted from the engineer's personal rancor, and was not in furtherance of the employer's business. Here we must accept the jury's verdict as a finding that Jackson's blows were not given in a private brawl, but the exercise of his authority as an officer. Hence we must determine the legal question first mentioned. The rule of the common law, as established by the weight of modern authority, imposes liability upon an employer for an assault committed by one of his employees upon another, when the former is in a position of authority and acts within the general scope and line of his employment. *Encarnacion v. Jamison,* 251 N. Y. 218, 167 N. E. 422. . . . Complaint is made because the court refused to charge that no subordinate officer has authority to administer discipline

without express delegation from the master. As an abstract legal proposition this may be true. *United States v. Taylor*, Fed. Cas. No. 16, 442; *Murray v. White*, 9 F. 562 (D. C. Me.) But, if charged in the form requested, it would have been likely to mislead the jury into the belief that the defendants could not be held responsible for Jackson's assault, if they should find he committed one. Obviously a blow with a monkey wrench was not a proper way to administer discipline, and the jury had in effect been previously so told. Jackson, as Cain's superior officer, had authority to order him on duty, or to reprimand him for being late, and if in connection with such an order or such a reprimand he used physical violence, for the purpose of forwarding the ship's business, the owner may be held liable. We do not regard as error the refusal of the requested charge."—*(Italics ours)*.

The ship owners carried the case on appeal to the United States Supreme Court. In a short opinion the highest Court in the land said:

"Respondent was a seaman employed as a fireman on the American Steamship Alpha navigating the high seas. The corporation petitioner owned and operated the vessel and the other petitioners were in possession of her. Respondent sued petitioners in the federal court for the southern district of New York to recover damages for personal injuries caused by an assault upon him by his superior, one Jackson, an assistant engineer in charge of the engine room. The complaint charged, and the evidence was sufficient to warrant a finding, that Jackson was authorized by defendants to direct plaintiff about his work, and that, for the purpose of reprimanding him for tardiness and compelling him to work, Jackson struck plaintiff with a wrench and seriously injured him. That was the basis of fact upon which the jury under the charge of the court was authorized to find for plaintiff. The jury returned a verdict in favor of plaintif for $12,-

000 and the judgment thereon was affirmed in the circuit court of appeals.

"That court expressed the opinion (35 F. (2nd) 717, 721) that Section 33 of the Merchant Marine Act, U. S. C. title 46, Section 688, and the Federal Employers' Liability Act, U. S. C. title 45, Sections 51-59, did not apply, and held defendants liable under the general maritime law without regard to these acts. But in *Jamison v. Encarnacion* decided this day (281 U. S. 635, ante, 1082, 50 Sup. Ct. Rep. 440) *we hold that such an assault is negligence within the meaning of Section 1 of the Federal Employers' Liability Act*, which is made available to seamen by Section 33 of the Merchant Marine Act. *The ruling in that case controls in this.*

DISTINCTIONS OF CASES

We point out the following distinctions between the cases of *Davis v. Green* and *A. C. L. Ry. vs. Southwell* and the case at bar:

1. The bad feeling of long standing between the deceased and his slayer.

2. Previous difficulties and harsh words between the two men.

3. The conductor was superior officer of the engineer and had given him an order. It was the inferior who killed his superior. Whereas, in this case the superior slew his inferior as the result of words about his work.

4. The desperate actions of the engineer in almost killing the negro switchman just before he shot his superior officer, showed that he was in a wild rage entirely unconnected with the company's business.

5. It was not the engineer's duty to order the conductor about with reference to the throwing of a switch, or any other train operation. Whereas, in this case it was the duty of the

engineer to give instructions to the deceased.

6. The engineer stopped his engine, came down and out of his cab and cursed at his superior officer, whose directions it was his duty to obey.

Similar distinctions appear with reference to the Southwell case, except that there are even stronger grounds to show that the killing was not done in the course of the employment of the special policeman Dallas.

These additional distinctions may be emphasized:

1. Southwell, the deceased, had completed his work and was on his way home at the time.

2. Southwell had a bitter enmity towards Dallas and had been reprimanded for his threats and acts towards him. Their differences seemed to have grown out of a strike which was going on at the time and was purely personal.

3. Dallas had absolutely no authority over Southwell and had no company business with him.

These, and other, reasons we think show that the Davis v. Green and Atlantic Coast Line Ry. Co. v. Southwell, cases are not authority here, but that the Encarnacion and Cain cases, being direct constructions of the Federal Employers' Liability Act in a case where a superior officer brutally assaulted an inferior employee in the course of their respective duties are controlling.

End